Supreme Court, U.S.
FILED
APR 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

88-1768

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

ARTHUR HEIM,

Petitioner,

vs.

High Plains Agricultural Credit Corp., et al.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Mr. Arthur Heim

Mr. Arthur Heim, Pro se
HC 63 Box 57
Bushnell, Nebraska 69128

Phone No. NONE

QUESTIONS PRESENTED FOR REVIEW

1. Is it right, just and lawful that this Petitioner was denied an equal ruling rendered by an Appeals Court of another Circuit, and was there a conflict of the Eighth Circuit Court's ruling of dismissal of allegations stated under 42 U.S.C. §1983?

2. Was there a conflict of rulings by federal Courts of the Eighth Circuit when the 6th Circuit ruled that dismissal without a hearing was judicial error?

3. Was there a conflict of rulings by federal courts of the Eighth Circuit when the 10th Circuit ruled that denial of rights were to be decided by a jury?

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IS NOT THE UNITED STATES CONSTITUTION STILL THE "SUPREME LAW OF THE LAND"? AND, IF IT IS, WHY DOES NOT THE CONSTITUTIONAL REQUIREMENT OF SEIZURE OF PROPERTY REQUIRE TO JUDICIAL PROCESS UNDER AGNELLO V. UNITED STATES, 269 U.S. 20, (1925) AND, IF SO, WHEN A SEIZURE DID OCCUR WITHOUT ADHERENCE TO THAT PROCESS, DID NOT THIS PETITIONER STATE A VALID CLAIM OF CIVIL RIGHTS VIOLATIONS IN THE FEDERAL COURT UNDER MONROE V. PAPE, 81 S. Ct, 433, (1961)?

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

ARHTUR HEIM

Petitioner,

v.

High Plains Agricultural Credit Corp., et. al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE EIGHTH CIRCUIT COURT OF APPEALS

The Petitioner, Arthur Heim, respectfully prays that a writ of certiorari issue to review the judgment of dismissal of the U.S. District Court at Lincoln, Nebraska, and the denial of the Petition for rehearing of the United States Court of Appeals for the Eighth Circuit. The dates of the dismissal at Lincoln, Nebraska was June 27, 1988, and the order of the Eighth Circuit Appeals Court was January 19, 1989.

OPINION BELOW

The U.S. District Court at Lincoln, Nebraska entered its decision dismissing the amended complaint on June 28, 1988, (signed by the Judge on June 27, 1988). A Memorandum was rendered also. The order is attached as Appendix A and the Memorandum attached as Appendix B.

The Eighth Circuit Court of Appeals denied a Petition for rehearing by the panel on January 19, 1989. The copy of the denial by the Appeals Court is attached as Appendix C.

The U.S. District Court at Lincoln, Nebraska denied the Petitioner his demand for a jury Trial as de demanded under a 9th Amendment right of the United States Constitution.

JURISDICTION

Jurisdiction of this Court is invoked under Article III, Section 2 of the United States Constitution:

The Judicial Power shall extend to all Cases, in law and in Equity, arising under this Consitution. Jurisdiction is invoked pursuant to 28 U.S.C. §2101(C).

CONSTITUTIONAL PROVISION INVOLVED

The Constitution of the United States, Amendments I, IV, V, IX, X, and XIV are each and severally involved.

STATEMENT OF THE CASE

The Petitioner filed a complaint alleging violations of his civil rights. The complaint was filed on Jan. 6, 1988 Case no. cv88-0-06 at Omaha, Nebraska Petitioner amended the complaint on June 17, 1988. Judge Warren K. Urbom dismissed

the complaint by ruling that the Federal Court lacked Jurisdiction under the United States Consitution, Amendments Five, Thirteen, and Fourteen. The Petitioner States and alleged violations of due process (accomplished when property was taken without a judgment), accomplished only under color of LAW. There was no state law which permitted the taking of the property, and the taking was unconstitutional. The taking of the property resulted in a complete loss of means of livlihood, without a fair opportunity to be heard and without having to prove any claim for taking or giving any accounting to a court. The Judge of the Lincoln, Nebraska Federal Court Stated that he was not saying the defendants had done no wrong.

Activities of the defendants as stated in the complaint include professional negligence, breach of professional duties, violations of banking regulations, and the denial of a complete audit of bank records. The defendant Bank took property of this petitioner before any judgement was rendered, would not provide an explanation for the taking, and did not follow state law when they took property. The taking of the property was a direct violation of Amendments IV and V of the United States Constitution.

The Constitutional violations were sufficient to satisfy a Bivens Claim.

The Eighth Circuit Court of Appeals agreed that dismissal was proper by the United States District Court at Lincoln, Nebraska, and thereby agreed that the Court had lacked subject matter jurisdiction.

The U.S. District Court and the Appeals Court had completely ignored the request of this petitioner for a jury trial, (as a right under amendment IX of the U.S. Constitution). Dismissal had been granted without a fair hearing on the merits.

The decision of the Eighth Circuit Court of Appeals is in conflict with decisions rendered by other Federal Courts of appeals on the same matter of allegations of civil rights violations, giving cause for granting a writ of Certiorari.

REASONS FOR GRANTING THE WRIT

IS NOT THE UNITED STATES CONSTITUTION STILL THE "SUPREME COURT OF THE LAND"? AND, IF IT IS, WHY DOES NOT THE CONSTITUTIONAL REQUIREMENT OF SEIZURE OF PROPERTY REQUIRE TO JUDICIAL PROCESS UNDER AGNELLO V. UNITED STATES, 269 U.S. 20, (1925) AND, IF SO, WHEN A SEIZURE DID OCCUR WITHOUT ADHERENCE TO THAT PROCESS, DID NOT THIS PETITIONER STATE A VALID CLAIM OF CIVIL RIGHTS VIOLATIONS IN THE FEDERAL COURT UNDER MONROE V. PAPE, 81 S. Ct., 433, (1961)?

When the Petitioner was seized of his property without a judgment or Court Order and without being able to obtain a fair hearing, due process now requires that relief be afforded in This High Court.

The Petitioner submits that his civil rights were violated when property was seized in violation of State Law, and the fact that no state Law was used to accomplish the deprivation of the property. The violations of guaranted protections of Amendments to the United States Constitution give rise to a Bivens claim, Bivens V. Six unknown Agents, 403 U.S. 388. This Court has previously ruled that when any person takes or (causes deprivation of property without a Court order or) the right of a hearing, such acts have violated Civil rights of search and seizure of the 4th Amendment of the U.S. Constitution and will be a valid claim in a federal Court, Monroe v. Pape, 81 S. Ct. 433, (1961). The 4th Amendment prohibits unreasonable seizure and that protection extends to "house" and "effects". The High Court has emphasized over and over again that the mandate of the Constitutional Amendments require adherence to judicial process, Agnello V. United States, 269 U.S. 20, (1925).

Petitioner also submits that the Eighth Circuit Court of Appeals has denied him equal rulings rendered by other Circuit Appeals Courts relating to Civil Rights Complaints.

The Eleventh Circuit Court in Motes v. Myers, 810 F. 2d 1055, (1987), ruled that deprivation of rights secured by the U.S. Constitution accomplished under color of state Law satisfy a civil rights violation, 42 U.S.C. § 1983.

Petitioner submits that the Eighth Circuit Court of Appeals denied him an equal ruling rendered by the 6th Circuit Appeals Court in Lucarell v. McNair, 458 F. 2d 836, (1972). In this case the Appeals Court ruled that on appeal of a Civil rights action, it was the duty of the Appeals Court to view the allegations of the complaint in light most favorable to the complaint, assuming truth of factual allegations contained therein, and also that dismission without a hearing by the Court is judicial error.

Petitioner submits that the Eighth Circuit Appeals Court failed to acknowledge that dismissal had occurred without a jury trial, (which had been requested). The 10th Circuit Court of Appeals ruled that in a Civil Rights Complaint, due process afforded a right to trial when allegations had been stated of unlawful seizure, Stringer v. Dilger, 313 F. 2d 563, (1963).

Petitioner submits that denials of ruling rendered by other Appeal Courts presents a federal question. He also submits that violations of Constitutional protections present a Bivens Claim.

CONCLUSION

Considering the foregoing reasons and authorities, this petitioner respectfully requests that a writ of Certiorari be issued to review the dismissals by the federal court and the Appeals Court.

Petitioner requests that the dismissals be reversed and that he be allowed due Process which includes a jury trial and the right to have all the issues and evidence entered into the Court record, and that a trial at Law be granted to him.

Dated on this 12th day of April, 1989.

Mr. Arthur Heim

Mr. Arthur Heim
HC 63 Box 57
Bushnell, Nebraska 69128

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

ARTHUR HEIM,	)	CV88-0-06
	)	
Plaintiff,	)	
	)	
vs.	)	ORDER
	)	
JUDGE JOHN D. KNAPP, et. al.,	)	
	)	
Defendants.	)	

Based on the reasons provided in the accompanying memorandum,

IT IS ORDERED that (1) the motion for recusal is denied, (2) the plaintiff's motion for a preliminary injunction, filing 38, is denied and, (3) the plaintiff's amended complaint, filing 36, is dismissed for lack of the court's lack of subject matter jurisdiction.

Dated June 27, 1988.

BY THE COURT

United States District Judge

ENTERED
ON THE DOCKET
JUN 28 1988
WILLIAM L. OLSON, Clerk
BY Janet Miller
Dep. Clerk

FILED
DISTRICT OF NEBRASKA
AT _____ M
JUN 27 1988
William L. Olson, Clerk
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

ARTHUR HEIM,	)	CV88-0-06
	)	
Plaintiff,	)	MEMORANDUM
	)	ON PLAINTIFF'S
vs.	)	MOTION FOR
	)	PRELIMINARY
JUDGE JOHN D. KNAPP, et. al.,	)	INJUNCTION
	)	
Defendants.	)	

The plaintiff, Arthur Heim, has filed an amended complaint and a motion for a preliminary injunction in response to my order of June 6, 1988, filing 35. Because I find that this court does not have jurisdiction over the subject matter of the amended complaint, I will deny the plaintiff's motion and dismiss his complaint.

The plaintiff seeks relief under 42 U.S.C. §§1983, 1985, and 1988, specificially claiming that the defendants defrauded him and intentionally inflicted emotional distress upon him in violation of the fourth, fifth, thirteenth and fourteenth amendments. See Amended Complaint, filing 36, at ¶¶ 1A., 10, 15, and 20. He claims that jurisdiction is based upon the existence of a federal question, 28 U.S.C. §1331, and upon the diverse citizenship of the parties, 28 U.S.C. §1332. The amended complaint reveals no facts upon which jurisdiction under either statute can be based.

Heim set forth the mailing addresses of the several defendants in the complaint, some of which indicate that the defendant may be either domiciled or have its principal place of business in Nebraska. Id. at ¶¶ 11, 13-16, and 18. Because the plaintiff also is domiciled in Nebraska, complete diversity between the plaintiff and all of the defendants does not exist. In explaining 28 U.S.C. § 1332, the United States Supreme Court stated:

> This statute and its predecessors have consistently been held to require complete diversity of citizenship. That is, diversity jurisdiction does not exist unles each defendent is a citizen of a different State from each plaintiff.

Owen Equipment & Erection Co., v. Kroger, 437 U.S. 365, 373 (1978) (emphasis original). Because Heim has not alleged facts to demonstrate that his citizenship is different from the citizenship of all the defendants, I conclude that this court lacks jurisdiction founded upon section 1332.

The plaintiff also contends that the court has federal question jurisdiction because his claims arise under 42 U.S.C. §§1983, 1985 and 1988. At the outset, I note that Heim cannot allege a claim for relief under section 1988 since that section primarily provides for an award of a reasonable attorney fee and costs to parties who prevail in section 1983 or 1985 actions. See 28 U.S.C. §1988. Moreover, section 1985 requires the plaintiff to allege that there was a conspiracy and that it was motivated by racial or by an otherwise class-based indiviously discriminatory animus. Because Heim has failed to allege the motivation necessary to support a claim under section 1985, I must conclude that he has failed to state a claim for relief under section 1985.

In order to state a claim for relief under section 1983, plaintiffs must "show that they have been deprived of a federally protected right, privilege or immunity as a result of action taken by persons acting under color of state law." Littlefield v. City of Afton, 785 F. 2d 596, 600 (8th Cir. 1986). Although the amended complaint states that several of the actions about which Heim complains were taken under "color of law," I find that Heim has not alleged facts to support the "under color of state law" requirement of section 1983, and therefore, that this court lacks jurisdiction to consider the complaint or the motion for a preliminary injunction.

All of the defendants named in this lawsuit are private persons or entities. The defendents include Robert Simmons,

an attorney who represented Heim in a previous action, High Plains Agricultural Credit Corporation, the First Wyoming Bank, Travelers Indemnity Company, Key Bank, Deuel County State Bank, and several individuals who are presumably in some way associated with these instutions. Basically, Heim's complaint alleges that the defendants have used the courts and the judicial process to take his property fraudulently pursuant to a conspiracy, and to inflict upon him emotional distress intentionally.

Some courts have found that the effect of the "color of state law" requirement of section 1983 and the state action requirement for stating a claim for relief under certain constitutional amendments are equivalent, although not identical. See Harley v. Oliver, 539 F. 2d 1143 (8th Cir. 1976); Cobb v. Georgia Power Co., 757 F. 2d 1248 (11th Cir. 1985). The remedy provided in section 1983 does not extend to actions of a purely private nature, but I find no mention in Heim's complaint of a governmental actor.

Heim indicates that he believes that the defendants have misused the judicial system to obtain a result that is unfavorable to him. This belief and the allegations that he uses to describe the belief do not satisfy the state action requirement. The Teneth Circuit, in Torres v. First State Bank of Sierra County, 588 F. 2d 1322 (10th Cir. 1978), decided a case in which a plaintiff sued several parties, including a bank and some of its officials, under section 1983. The court explained that "(t)his is a case where private parties only were involved in state court litigation and it is alleged that the order granted by the court is erroneous and infringes on one party's rights to procedural due process." Id. at 1327. See also Kotmair v. Gray, 505 F. 2d 744, 745 (4th Cir. 1974). Though Heim did not specifically allege that the banks' actions constituted state action for purposes of section 1983, I note that the fact that banks are chartered by some local or federal government does not transform private actions taken by them or their employees into state action.

Further, the state action requirement cannot be satisfied on the basis that a lawyer is a named defendant or on the basis that the lawyer's actions took place in state court. The Eighth Circuit has held that the actions of a private attorney, even one who is appointed and paid by the state, do not constitute actions taken under color of state law for purposes of section 1983 actions. Chambers v. Kaplan, 648 F. 2d 1193, 1194 (8th Cir. 1981).

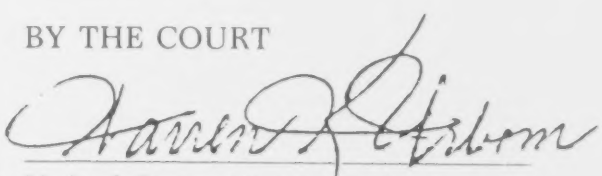
For these reasons, I conclude that Heim has not stated facts sufficient to present a federal question to this court. Since this court lacks jurisdiction over the subject matter of the action, I must dismiss this case based on the court's motion.

This does not mean that the defendants have done no wrong nor that the plaintiff has no recourse. I know nothing of what the defendants have done, but even if they have done exactly what the plaintiff says they have and if the plaintiff is able to prove it, this court has not jurisdiction. Some other court may have; this one does not. If I were to hear the case and order all the relief the plaintiff requests, the order would be overturned on appeal. That would waste everybody's time.

A motion for recusal was filed on June 23, supported by the affidavit of Arthur Heim. The affidavit contains no statement of facts that, assuming them to be true, would justify my recusal. Title 28, U.S.C. § 144 and 455 set out the requirements for recusal. In the absence of facts meeting those requirements I should not recuse myself.

Dated June 27, 1988.

BY THE COURT



United States District Judge

FILED
DISTRICT OF NEBRASKA
AT _____ M
JUN 27 1988
William L. Olson, Clerk
By _____ Deputy

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2073

Arthur Heim,	*	
	*	
Appellant,	*	
	*	
v.	*	
	*	
High Plains Agricultural Credit Corporation; Jack Crews,k as loan officer, Eldon Stellpflug, as President; Jack Peters, as V.P., Merlin Olsen, as V.P.; First Wyoming Bank, a/k/a Cheyenne Nat'l Bk.; William Allen, as Pres. Travelers Indemnity Co.; Kent Goodman, agent, Deuel Co. St. Bk.; J. W. Bill Epson, Pres.; June E. Lamureux, officer Key Bank, a/k/a Commercial Security Bank; Patty Banks, as officer; Robert G. Simmons, other unnamed John Does and Mary Janes,	*	Appeal from the United States District Court for the District of Nebraska.
	*	
Appellees.	*	

Submitted: November 30, 1988

Filed: December 12, 1988

Before HEANEY, BOWMAN, and BEAM, Circuit Judges.

PER CURIAM:

Arthur Heim appeals the district court's[1] order dismissing his civil rights suit for lack of subject matter jurisdiction. We affirm.

A review of the complaint indicates that complete diversity between the parties does not exist. Title 42 U.S.C. §1988 cannot establish a basis for jurisdiction. Heim has failed to allege the discriminatory motivation necessary to support a claim for relief under 42 U.S.C. § 1985, and has failed to allege the state action necessary to support a claim for relief under 42 U.S.C. § 1983.

Accordingly, we affirm on the basis of the district court's well-reasoned opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

---

[1]The Honorable Warren K. Urbom, United States District Judge for the District of Nebraska.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2073NE

Arthur Heim,	*	
	*	
Appellant,	*	
	*	Appeal from the United
vs.	*	States District Court for the
	*	District of Minnesota.
High Plains Agricultural	*	
Credit Corporation, etc., et al,	*	
	*	
Appellees.	*	

Appellant's pro se petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

January 19, 1989

Order entered at the Direction of the Court:

Robert D. St. Vrain

Clerk, U. S. Court of Appeals, Eighth Circuit.

No. 88-1768

Supreme Court, U.S.
FILED
MAY 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

ARTHUR HEIM,

Petitioner,

vs.

HIGH PLAINS AGRICULTURAL CREDIT CORPORATION, JACK CREWS, as Loan Officer; ELDON STELLPFLUG, as President; JACK PETERS, as Vice President; MERLIN OLSEN, as Vice President; FIRST WYOMING BANK, a/k/a CHEYENNE NATIONAL BANK; WILLIAM ALLEN, as President; TRAVELERS INDEMNITY COMPANY, A Corporation; KENT GOODMAN, Agent; DEUEL COUNTY STATE BANK; J. W. BILL EPSON, President; JUNE E. LAMUREUX, Officer; KEY BANK, a/k/a COMMERCIAL SECURITY BANK; PATTY BANKS, as Officer; ROBERT G. SIMONS; Other Unnamed JOHN DOES and MARY JANES,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS TRAVELERS INDEMNITY COMPANY AND KENT GOODMAN

David A. Blagg, Counsel of Record
Charles F. Gotch
Michael K. Huffer
OF: Cassem, Tierney, Adams,
Gotch & Douglas
8805 Indian Hills Drive
Suite 300
Omaha, Nebraska 68114
(402) 390-0300
Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether Petitioner has satisfied the grounds for granting a Petition for Writ of Certiorari?

2. Whether the Eighth Circuit Court of Appeals properly affirmed the dismissal of Petitioner's 42 U.S.C. § 1983 cause of action?

3. Must a United States District Court hold an oral hearing prior to dismissing a case for lack of subject matter jurisdiction?

PARTIES

ARTHUR HEIM

HIGH PLAINS AGRICULTURAL CREDIT CORPORATION;

JACK CREWS, as Loan Officer;

ELDON STELLPFLUG, as President;

JACK PETERS, as Vice President;

MERLIN OLSEN, as Vice President;

FIRST WYOMING BANK, a/k/a CHEYENNE NATIONAL BANK;

WILLIAM ALLEN, as President;

TRAVELERS INDEMNITY COMPANY, A Corporation;

KENT GOODMAN, Agent;

DEUEL COUNTY STATE BANK;

J. W. BILL EPSON, President;

JUNE E. LAMUREUX, Officer;

KEY BANK, a/k/a COMMERCIAL SECURITY BANK;

PATTY BANKS, as Officer;

ROBERT G. SIMMONS;

Other unnamed JOHN DOES and MARY JANES

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OPINIONS BELOW

The Memorandum of the District Court (CV 88-0-06) and the opinions of the Court of Appeals (No. 88-2073) are not officially reported.

JURISDICTION

The Judgment of the Court of Appeals was entered December 12, 1988 and the Petition for Rehearing was denied January 19, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §2101(c).

STATUTES AND RULES INVOLVED

Rule 17.1(a), Rules of the Supreme Court of the United States:

(See Appendix, A-2 for text).

42 U.S.C. §1983: (See Appendix, A-3 for text).

Rule 12(h)(3), Federal Rules of Civil Procedure:

> Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

STATEMENT OF CASE

This case arises out of a foreclosure action filed by Travelers Indemnity Company ("Travelers")[1] against

[1] See Appendix for List of Parent Companies, Subsidiaries and Affiliates of Travelers Indemnity Company.

Petitioner Arthur Heim in the late 1970's. Thereafter, Travelers was granted a foreclosure decree and sold real property pursuant thereto. The foreclosure decree and subsequent sale were affirmed by the Nebraska Supreme Court. *Travelers Indemnity Co. v. Heim,* 218 Neb. 326, 352 N.W.2d 921 (1984); *Travelers Indemnity Co. v. Heim,* 223 Neb. 75, 388 N.W.2d 106 (1986).

Petitioner filed this matter with the United States District Court for the District of Nebraska on January 6, 1988. In his initial pleading designated "Petition", Mr. Heim named various defendants including a Nebraska State District Court judge, a Colorado State District Court judge, the members of the Nebraska Supreme Court, Travelers and High Plains Agricultural Credit Corporation, and various individuals and banks residing in Wyoming, Nebraska and Utah. Petitioner alleged four causes of action against the Respondents. His first cause of action was based upon fraud. Next, he alleged the Respondents conspired against him to force him to encumber his land. In his third cause of action, Mr. Heim alleged coercion exercised by the Respondent was intended to cause him emotional distress. Under his final cause of action, Petitioner alleged the Respondents libeled him through statements to the effect that Mr. Heim is a "bad operator", a "poor manager" and that he "lived most extravagantly". Travelers, as well as most of the other Respondents, filed timely Motions to Dismiss.

Upon review of the Motions to Dismiss, the United States District Court Judge Warren K. Urbom dismissed the claims against the judges and the members of the

Nebraska Supreme Court on the basis of judicial immunity. Next, Judge Urbom dismissed the claims raised against the remaining Respondents, ruling Mr. Heim had failed to state claims upon which relief could be granted. At the conclusion of his Order dismissing Petitioner's claims against Respondents, Judge Urbom allowed Mr. Heim fifteen days to file an Amended Complaint.

Petitioner filed an Amended Complaint on June 17, 1988. He also filed a Motion for Preliminary Injunction. The district court dismissed Petitioner's Amended Complaint on its own motion through an Order dated June 27, 1988. In the Court's Memorandum filed contemporaneously with its Order, Judge Urbom ruled the Petitioner is seeking relief "under 42 U.S.C. §§1983, 1985, and 1988, specifically claiming that the defendants defrauded him and intentionally inflicted emotional distress upon him in violation of the fourth, fifth, thirteenth and fourteenth amendments". June 27, 1988 Memorandum, p. 1; Appendix B-1 to Petition for Writ of Certiorari. In reviewing the claims, the court ruled it lacked jurisdiction pursuant to 28 U.S.C. §1332 due to lack of complete diversity between the parties. Judge Urbom also found federal question jurisdiction was lacking on plaintiff's §1983 claim because plaintiff's allegations do not satisfy the state action requirement. Finally, the court ruled plaintiff failed to state a claim upon which relief could be granted under § 1985 because plaintiff failed to allege that there was a conspiracy motivated by racial or an otherwise class based invidiously discriminatory animous.

The United States Court of Appeals for the Eighth Circuit affirmed the district court's dismissal of Mr.

Heim's Amended Complaint through a *per curiam* opinion filed December 12, 1988. Appendix C-1 to Petition for Writ of Certiorari. On January 19, 1989 the Eighth Circuit denied Mr. Heim's Petition for Rehearing *En Banc*. Through his Petition for Writ of Certiorari, Petitioner requests that this Court review the Eighth Circuit Court of Appeals' decision affirming Judge Urbom's dismissal of the Amended Complaint. Upon review of the Petition for Writ of Certiorari, it appears Petitioner is requesting that this Court solely review the dismissal of his Section 1983 claims.

ARGUMENT

I.

PETITIONER HAS FAILED TO ALLEGE SPECIAL AND IMPORTANT REASONS IN SUPPORT OF HIS PETITION FOR WRIT OF CERTIORARI AND, THEREFORE, THE PETITION MUST BE DENIED.

Rule 17.1(a) of the Rules of the Supreme Court of the United States indicates a review on Writ of Certiorari will be granted only when there are special and important reasons therefor. Those reasons include where there are conflicting decisions by federal courts of appeals on the same matter; when a federal court of appeals decides a federal question in a way in conflict with a state court of last resort; or when a federal court of appeals has departed from the accepted and usual course of judicial proceedings or sanctions such a departure by a lower court.

Petitioner has cited cases from the United States Supreme Court and the Sixth, Tenth and Eleventh Circuit Courts of Appeals in an attempt to establish that the Eighth Circuit Court of Appeals' decision affirming dismissal of his claims amounted to a conflict with the decisions of this Court and other federal courts of appeals. Alternatively, Petitioner may be arguing that the Eighth Circuit Court of Appeals decision sanctioned a departure from the accepted and usual course of judicial proceedings. However, upon review of the decisions cited by Petitioner, it is apparent the underlying decision dismissing Mr. Heim's claims does not conflict with any of those cases.

Petitioner, for the first time, has alleged that he stated a claim upon which relief can be granted under the decision of this Court in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In *Bivens*, this Court ruled that an individual may bring a federal cause of action under the Fourth Amendment for damages sustained as a result of federal agents' violation of that Amendment. The holding in *Bivens* has no application to this case whatsoever. As stated by Judge Urbom at page 2 of his opinion, all of the defendants named in this lawsuit are private persons or entities. Appendix to Petition for Writ of Certiorari, B-2. Petitioner has made no allegation that any of the named defendants were federal agents, employees or acting under color of federal law.

Next, Petitioner cites *Monroe v. Pape*, 365 U.S. 167 (1961), overruled, *Monell v. Department Social Services of City of New York*, 436 U.S. 658 (1978), for the proposition that when "any" person takes or causes deprivation of

property without a court order or the right of a hearing, such act constitutes a violation of the Fourth Amendment. To the contrary, this Court in *Monroe v. Pape*, ruled that actions by Chicago police officers constituted acts under color of state law within the meaning of 42 U.S.C. §1983. This Court did not rule that a party states a federal claim when he alleges that "any" person has violated the Fourth Amendment. *Agnello v. United States*, 269 U.S. 20 (1925), is likewise inapplicable to the claims raised by Petitioner. *Agnello* dealt with the admissibility of evidence obtained through a warrantless search.

Moreover, the three circuit court opinions cited by Mr. Heim do not conflict with either the district court's decision or the appellate court's decision in this case. Indeed, the court in each case cited by Petitioner states that a civil rights plaintiff must allege action by the named defendants under color of state law in order for §1983 to apply. *Motes v. Myers*, 810 F.2d 1055, 1058 (11th Cir. 1987); *Lucarell v. McNair*, 453 F.2d 836, 838 (6th Cir. 1972); *Stringer v. Dilger*, 313 F.2d 536, 540 (10th Cir. 1963). In this case, the district court ruled Petitioner failed to meet that requirement when he amended his initial pleading. As such, the Court lacked subject matter jurisdiction and dismissed Mr. Heim's claims based upon Federal Rule of Civil Procedure 12(h)(3).

The Sixth, Tenth and Eleventh Circuits also acknowledge that a Court not only has the right, but the duty, to dismiss a case *sua sponte* when it finds it lacks subject matter jurisdiction. *Fitzgerald v. Seaboard System R.R., Inc.*, 760 F.2d 1249, 1251 (11th Cir. 1985); *Tafoya v. U.S. Dept. of Justice, Law Enforcement Assist. Admin.*, 748 F.2d 1389, 1390 (10th Cir. 1984); *Gross v. Hougland*, 712 F.2d 1034, 1036

(6th Cir. 1983), cert. denied, *Hougland v. Gross*, 465 U.S. 1025 (1984).

Petitioner cites *Lucarell* for the proposition that it is the duty of an Appellate Court to review the allegations of a civil rights complaint in the light most favorable to the plaintiff. The Eighth Circuit Court of Appeals also recognizes that *pro se* civil rights pleadings should be construed liberally. *Martin v. Aubuchon*, 623 F.2d 1282, 1285-86 (8th Cir. 1980). Nonetheless, where a court finds it lacks subject matter jurisdiction, the Complaint or Amended Complaint must be dismissed.

II.

THIS COURT SHOULD NOT GRANT A WRIT OF CERTIORARI BECAUSE THE DISTRICT COURT DID NOT HAVE SUBJECT MATTER JURISDICTION.

Title 42 U.S.C. §1983 provides a remedy for deprivation of rights secured by the Constitution and laws of the United States when that deprivation takes place "under color of any statute, ordinance, regulation, custom, or usage of any state or territory . . . ." Petitioner's claims under §1983 amount to an allegation that the Respondents deprived him of property in violation of the Due Process Clause to the Fourteenth Amendment. He contends that the Respondents' acts were under color of state law or amount to state action by virtue of the fact that Respondent banks were regulated by the states in which they are found. Petitioner does not attack the constitutionality of any state law or procedure.

This Court recently held:

> The Fourteenth Amendment of the Constitution provides in part that '(n)o State shall . . . deprive any person of life, liberty or property without due process of law.' Since this Court's decision in the *Civil Rights Cases*, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883), 'the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States.' *Shelley v. Kraemer*, 334 U.S. 1, 13, 68 S.Ct. 836, 842, 92 L.Ed. 1161 (1948). 'That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.' *Ibid.*

Blum v. Yaretsky, 457 U.S. 991, 1002 (1982).

When a party brings a §1983 action, he must first show that he has been deprived of a right "secured by the Constitution and the laws" of the United States. After he meets this first requirement, he must then show the defendants deprived him of this right acting under color of state law. *Flag Bros., Inc. v. Brooks*, 436 U.S. 149, 155-56 (1978).

The facts as alleged by Petitioner simply do not indicate Respondents' acts amounted to state action under the Fourteenth Amendment. Generally, an entity is not a state actor even though it is regulated by the state. In *Blum*, this Court identified three factors to be considered in determining whether particular conduct constitutes "state action" under the Amendment: (1) there must be a "sufficiently close nexus between the State and the challenged action of the regulated entity so the action of the latter may fairly be treated as that of the State itself"; (2) the nexus must be such that the State "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice in law be

deemed to be that of the State"; and (3) "the private entity has exercised powers that are 'traditionally the exclusive prerogative of the State.' " 457 U.S. at 1004-05. None of the acts complained of by Petitioner can even arguably fall within any of these three criteria. The financial institutions herein either filed a foreclosure action, maintained Mr. Heim's bank account or transferred funds. Each of these acts is traditionally the function of a financial institution acting as a creditor, or depository.

At the third page of his June 27th Memorandum, Judge Urbom notes Mr. Heim indicates "he believes the defendants have misused the judicial system to obtain a result that is unfavorable to him". Appendix to Petition for Writ of Certiorari, B-3. Assuming this is true, Petitioner still failed to allege state action or that the Respondents acted under color of state law for purposes of Section 1983. In *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982), this Court espoused a two-part test used to determine whether the deprivation of a federal right occurs under color of state law as required by Section 1983:

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.

Id. at 937.

In *Lugar*, this Court ruled private misuse of state law or procedure does not amount to action under color of

state law. *Id.* at 940. A private individual acts under color of state law only where he jointly participates with state officials in the seizure of disputed property. *Id.* at 941. Petitioner has made no allegation that state officials have seized any of his property nor can such an allegation be read into his Amended Complaint.

Accordingly, the lower court's decision affirming the dismissal of Petitioner's §1983 claim for lack of subject matter jurisdiction should be sustained. He failed to allege facts which indicate state action was involved in the taking of his property. Furthermore, he failed to allege facts which indicate the Respondents acted under color of state law.

Mr. Heim also asserts in his Petition that the district court erred in dismissing his Amended Complaint because he was not allowed a hearing prior to dismissal. The District Court acted well within its authority when it dismissed Petitioner's claim pursuant to Federal Rule of Civil Procedure 12(h)(3).

Rule 12(h)(3) provides:

> Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Pursuant to this Rule, a federal court is required to dismiss an action once it appears to the court that it lacks subject matter jurisdiction. *Fitzgerald,* 760 F.2d at 1251. The Rule requires neither a motion to be filed nor a hearing to be held.

In this case, the District Court apparently reviewed Petitioner's Amended Complaint in conjunction with an attempt to rule on his Motion for Preliminary Injunction.

Upon review of the Amended Complaint, the Court found it lacked jurisdiction over the subject matter of plaintiff's §1983 claims. In dismissing the action, the Court was merely following the duty imposed upon it by Rule 12.

Moreover, there has been no showing that Petitioner was unduly prejudiced by the district court's relatively swift dismissal of his Amended Complaint. His first pleading was dismissed after numerous defendants filed Motions to Dismiss with accompanying briefs. Mr. Heim had ample opportunity to respond to those Motions to Dismiss. Additionally, once the court dismissed Petitioner's initial pleading, he was granted leave to amend. The allegations raised in the Amended Complaint indicate the court lacked subject matter jurisdiction over his §1983 claim. As such, the district court dismissed Petitioner's claims without prejudice to refiling with another Court which does have proper jurisdiction. June 27, 1988 Memorandum, p. 4; Appendix to Petition for Writ of Certiorari, B-4.

CONCLUSION

This Court should not grant the Petition for Writ of Certiorari. The Petition failed to allege grounds to satisfy the stringent requirements of Rule 17, Rules of the Supreme Court of the United States. The decisions by the courts below do not conflict with decisions of other federal courts of appeal on the same issues and neither the Eighth Circuit Court of Appeals nor the district court departed from accepted and usual judicial proceedings.

Moreover, the Eighth Circuit Court of Appeals' decision affirming the district court's dismissal of the Amended Complaint was correct and will be affirmed if this case is to be heard on the merits.

TRAVELERS INDEMNITY COMPANY
and KENT GOODMAN, Respondents

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APPENDIX

The following documents are included by the Respondents Travelers Indemnity Company and Kent Goodman within their Appendix:

Document	Pages
Rule 17.1(a), Rules of the Supreme Court of the United States	A-2
Title 42 U.S.C. §1983	A-2
List of Parent Companies, Subsidiaries and Affiliates of Travelers Indemnity Company	A-4 through A-8

Rule 17. Considerations governing review on certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

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42 U.S.C. §1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of

Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

List of Parent Companies, Subsidiaries and Affiliates of Travelers Indemnity Company

ABC Management Inc.
Adams Service Company, Ltd.
Adria – TIC International Holdings, S.A.
Aggressive Stock Trust
ATALFA (UK)
Bankers and Shippers Insurance Company
Blue Ash Associates Limited Partnership
C.S.I., Inc.
Cash Income Trust
Center for Corporate Health Promotion, Inc.
Charter Oak Fire Insurance Company, The
Connecticut Fire Insurance Company, The
Conservco
Consolidated Agencies Northwest, Inc.
Constitution Plaza, Inc.
Constitution State Insurance Company, The
Constitution State Management Company
Constitution State Service Company
Derby Advertising, Inc.
Dillon, Read Inc.
Dillon, Read Capital Inc.
Dillon, Read & Co. Inc.
Dillon, Read Development Inc.
Dillon, Read Enskilda Partners
Dillon, Read (France) S.A.
Dillon, Read Interfunding Inc.
Dillon, Read International Asset Management
Dillon, Read International Marketing Service, Inc.
Dillon, Read International Securities Inc.
Dillon, Read Limited
Dillon, Read Mortgage Capital Inc.
Dillon, Read Real Estate Inc.
Dillon, Read Securities, Inc.
Dillon, Read Services Inc.
Dillon, Read (UK) Limited
Dublin Regional Plaza Joint Venture
89th and York Avenue Corporation
ERMC, Inc.

Fiduciary Investment Company, Inc.
Fund Administrators, Inc.
Harbor Keystone Advisers, Inc.
H. C. Copeland and Associates, Inc.
H. C. Copeland and Associates Equities, Inc.
H. C. Copeland Associates, Inc. of Massachusetts
H. C. Copeland Financial Services, Inc.
High Yield Bond Trust
Intangible Marketing, Inc.
KBA 3 Limited Partnership
Keystone Blue Ash Limited Partnership
Keystone Custodian Fund – Series B-1
Keystone Custodian Fund – Series B-2
Keystone Custodian Fund – Series B-4
Keystone Custodian Fund – Series K-1
Keystone Custodian Fund – Series K-2
Keystone Custodian Fund – Series S-1
Keystone Custodian Fund – Series S-3
Keystone Custodian Fund – Series S-4
Keystone Custodian Funds, Inc.
Keystone Distributors Inc.
Keystone Financial Corporation
Keystone Group, Inc.
Keystone International Fund, Inc.
Keystone Investment Management Corporation
Keystone Liquid Trust
Keystone Precious Metals Holdings, Inc.
Keystone Properties, Inc.
Keystone Realty Advisors, Inc.
Keystone Realty Partners
Keystone Tax Exempt Trust
Keystone Tax Free Fund
KPI 85, Inc.
La Metropole S.A.
London and Hartford Corporation
Managed Assets Trust
Managed Health Care Service, Inc.
Massachusetts Company, Inc., The
Master Reserves Tax Free Trust
Master Reserves Trust
Meadow Lane, Inc.

Money Market/Options Investments, Inc.
N.S.P.D.R. Inc.
Panther Valley Country Club, Inc.
Panther Valley, Inc.
Panther Valley Service, Inc.
Park Place West Limited Partnership
Pequest Sewer Company
Pequest Water Company
Phoenix Insurance Company, The
Plaza Corporation, The
Prospect Company, The
Prospect Management Services Company (Del.)
Prospect Nebraska Land Holding Company, Inc.
Salem Funds, The
Syd Tozier & Associates, Insurance Brokers, Inc.
Terra Nova Insurance Company Limited
TDR Mortgage Securities I, Inc.
Travelers Asset Funding Corporation
Travelers Asset Management International Corporation
Travelers Corporation, The
Travelers Corporation of Bermuda Limited, The
Travelers Corporation (U.K.) Ltd
Travelers Diebold Technology Company, Inc.
Travelers/EBS, Inc.
Travelers Equities Sales, Inc.
Travelers Fund B for Variable Contracts, The
Travelers Fund B-1 for Variable Contracts, The
Travelers General Agency of Hawaii, Inc.
Travelers Growth Stock Account for Variable Annuities, The
Travelers Health Network, Inc.
Travelers Health Network of Austin, Inc.
Travelers Health Network of California, Inc.
Travelers Health Network of Connecticut, Inc.
Travelers Health Network of Florida, Inc.
Travelers Health Network of Illinois, Inc.
Travelers Health Network of Louisiana, Inc.
Travelers Health Network of New Jersey, Inc.
Travelers Health Network of New York, Inc.
Travelers Health Network of Pennsylvania, Inc.
Travelers Health Network of South Carolina, Inc.
Travelers Health Network CMP of South Carolina, Inc.

Travelers Health Network of Tennessee, Inc.
Travelers Health Network of Texas, Inc.
Travelers Health Network of Virginia, Inc.
Travelers Home Equity Centers, Inc.
Travelers Home Insurance Center, Inc.
Travelers Income Properties – I
Travelers Income Properties – II
Travelers Indemnity Company, The
Travelers Indemnity Company of America, The
Travelers Indemnity Company of Illinois, The
Travelers Indemnity Company of Rhode Island, The
Travelers Insurance Company, The
Travelers Insurance Company of Illinois, The
Travelers Insurance Corporation Proprietary, Limited, The
Travelers International Finance Company N.V.
Travelers Investment Management Company, The
Travelers of Ireland Limited
Travelers Keystone Fixed Income Advisers, Inc.
Travelers Life and Annuity Company, The
Travelers Life Insurance Company, The
Travelers Life Insurance Company of Connecticut
Travelers Lloyds Insurance Co.
Travelers Marine Corporation, The
Travelers Money Market Account for Variable Annuities
Travelers Mortgage Capital Corporation
Travelers Mortgage Insurance Agency, Inc. (Delaware Incorporated)
Travelers Mortgage Insurance Agency, Inc. (New Jersey Incorporated)
Travelers Mortgage Securities Corporation
Travelers Mortgage Services, Inc., The
Travelers Plan Administrators, Inc.
Travelers Plan Administrators of Arizona
Travelers Plan Administrators of California
Travelers Plan Administrators of Colorado
Travelers Plan Administrators of Florida
Travelers Plan Administrators of Illinois
Travelers Plan Administrators of Michigan
Travelers Plan Administrators of Minnesota
Travelers Plan Administrators of Ohio
Travelers Plan Administrators of Pennsylvania

Travelers Plan Administrators of Tennessee
Travelers Plan Administrators of Texas
Travelers Plan Administrators of Washington
Travelers Quality Bond Account for Variable Annuities, The
Travelers Real Estate Investment Trust
Travelers Real Estate Investment Trust 2
Travelers Realty/100 L.P.
Travelers Realty Income Investors
Travelers Realty Investment Company
Travelers Realty Network, Inc.
Travelers Reinsurance Company of Bermuda Limited
Travelers Syndicate 1, Inc., The
Travelers Timed Aggressive Stock Account for Variable Annuities
Travelers Timed Bond Account for Variable Annuities
Travelers Timed Growth Stock Account for Variable Annuities
Travelers Timed Money Market Account for Variable Annuities
Travtech, Inc.
University Research Associates, Inc.
Wine Fund Managers (Guernsey) Ltd.
Wynne Agency (Joseph A.)